

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 28361-5-III
)	
Respondent,)	
)	
v.)	Division Three
)	
MARITESS IBANEZ PALMER,)	
)	
Appellant.)	UNPUBLISHED OPINION

Korsmo, J. — Maritess Palmer challenges the trial court’s decision to impose \$9,600 in restitution in connection with her third degree theft conviction. We agree with the trial court’s methodology and do not see that the trial court abused its discretion in making the award. The judgment is affirmed.

FACTS

Ms. Palmer started work as a cashier at the Loon Lake Conoco gas station and convenience store on February 7, 2007. She was fired October 18, 2007, after one of the owners observed her, via the video surveillance system, steal from the register.

A criminal prosecution was commenced in the Stevens County Superior Court.¹ The parties reached an agreement by which Ms. Palmer entered a guilty plea to an amended charge of third degree theft, a gross misdemeanor. RCW 9A.56.050. The plea agreement expressly stated that the amount of restitution was in dispute and would be established at a separate hearing. The plea form also advised Ms. Palmer that the trial court was not limited in the amount of restitution that could be ordered.

Co-owner Baljit Kaur testified at the hearing. She explained how on October 18 she had observed Ms. Palmer ring up a “can of chew” for a customer, then hit the “no sale” and “error correction” keys. She then took the money from the customer and placed it in the register drawer on the side where checks were stored. Later, she removed the money and put it in her purse.

Ms. Kaur and the store manager, Annie McMillan, reviewed all of the register tapes for the period of Ms. Palmer’s employment for similar transactions. Each of them reviewed one-half of the records. Ms. McMillan did not testify at the hearing.

Ms. Kaur testified that Ms. Palmer used the “error correct” key an average of 20 times per shift; most experienced clerks, such as Ms. Palmer, typically averaged about six uses of the correction key per shift. Ms. Kaur also testified that the store suffered about a

¹ Presumably a felony theft count was alleged, but the original charging document and the transcript of the guilty plea hearing are not part of the record of this appeal.

\$14,000 loss in inventory during Ms. Palmer's employment.

The two reviewers determined that the "correct error/no sale" combinations for Ms. Palmer's register number totaled \$7,175.01. The reviewers did not include error corrections that involved re-ringing in a new sale.

The trial court accepted the methodology, but discounted the amount by one-third to reflect the average use of the error correction key. The court decided that Ms. Kaur proved \$4,800 had been taken. The court then exercised its statutory authority and doubled that figure to \$9,600.

A corresponding order was entered. Ms. Palmer then timely appealed to this court.

ANALYSIS

Ms. Palmer challenges the methodology employed by the trial court as well as reliance upon work done by Ms. McMillan who did not testify. She does not challenge the court's decision to double the amount of the victim's established losses.²

The power to order restitution is entirely based on statute. *State v. Smith*, 119 Wn.2d 385, 389, 831 P.2d 1082 (1992). The statutory scheme grants "broad powers of

² RCW 9A.20.030(1) authorizes restitution awards up to double the defendant's gain or the victim's loss. Comparable power exists in Sentencing Reform Act (SRA) provisions. Chapter 9.94A RCW. The SRA, however, only governs felony proceedings. It does not extend to gross misdemeanor prosecutions such as this case. *State v. Marks*, 95 Wn. App. 537, 539, 977 P.2d 606 (1999).

restitution.” *Id.* A trial court’s restitution order is reviewed for abuse of discretion. *State v. Davison*, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Restitution must be established by a preponderance of the evidence. *State v. Kinneman*, 155 Wn.2d 272, 285, 119 P.3d 350 (2005). Evidence is sufficient to support a restitution order if it provides a reasonable basis, other than conjecture or speculation, to estimate the loss. *Id.*; *State v. Fleming*, 75 Wn. App. 270, 274-275, 877 P.2d 243 (1994). Restitution is not limited to cases where the damage computation is simple. *Kinneman*, 155 Wn.2d at 285.

The method used here provided a reasonable basis—not conjecture or speculation—to identify the amount lost to Ms. Palmer’s theft. The reviewers identified each instance in which Ms. Palmer had used the combination of “correct error/no sale” keys that she had used in the theft observed by Ms. Kaur. They declined to include instances where Ms. Palmer had apparently properly used the key combination to ring in a corrected sale amount. Nonetheless, the court still discounted the identified losses by one-third to the benefit of Ms. Palmer. The result was a reasonably precise calculation of actual losses. The evidence was sufficient to support the order. *Kinneman*, 155 Wn.2d at

285.

Ms. Palmer also argues that the court should not have relied upon the work of Ms. McMillan since she did not testify at the hearing. She acknowledges, however, that the rules of evidence do not apply to restitution hearings. ER 1101(c)(3); *State v. Kisor*, 68 Wn. App. 610, 620, 844 P.2d 1038, *review denied*, 121 Wn.2d 1023 (1993). Instead, basic due process concerns govern this situation—did the defendant have the opportunity to contest the evidence and was it reasonably reliable? *Kisor*, 68 Wn. App. at 620. We believe those standards were satisfied here. Ms. Kaur testified to the process the reviewers used and was examined about it by the defense. We have already determined that the trial court correctly found the process to be reliable and reasonably precise. There is simply no reason to believe that Ms. McMillan varied from the process that Ms. Kaur testified about. The hearing provided basic due process to Ms. Palmer.

The trial court exercised its statutory authority to double the amount of restitution. In light of the testimony of Ms. Kaur, the court could have doubled the entire established loss of \$7,175 to a total of \$14,300, a figure that was in keeping with the estimated inventory losses during Ms. Palmer's tenure at the Conoco. The decision to award only \$9,600 was based on tenable reasons and was well within the trial court's discretionary authority. There was no abuse of discretion.

No. 28361-5-III
State v. Palmer

The order is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Kulik, C.J.

Brown, J.